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OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,
v.
BRIAN F. WEBER, ET AL.,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
v.
BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,
v.
BRIAN F. WEBER, ET AL.,
Respondents.

BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE CONGRESSIONAL BLACK CAUCUS THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE CENTER FOR URBAN LAW

[continued on inside cover]

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Section 1. Neither slavery nor unvoluntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [1868] 5, 8

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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INTEREST OF *AMICI CURIAE*

The 63 national and local organizations which have joined as *amici curiae* in this brief represent many sectors of American society—civil rights groups, church groups, bar associations, rank and file labor groups, labor unions, political groups, women's organizations, community groups, and other organizations concerned with the public interest. They have done so from a mutual deep concern that the reversal of the *Weber* case is of vital importance to all affirmative action programs across the country.

These groups share a belief that over 200 years of discrimination on the basis of race, sex and national origin has resulted in freezing non-whites and women out of jobs, skills training, and promotional opportunities. Affirmative action has proven to be in many instances the only effective tool towards alleviating the still pervasive badges and incidents of slavery in American society. Any cut-backs in affirmative action programs and the underlying commitment which they represent will result in continuing the injustices described in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The pursuit of racial equality in this country is at a crossroads. It is the pivotal function of this Court to chart the proper course. Either this Court will reverse the majority decision (as *Amici* will strongly urge herein) and allow this country to move forward toward racial equality, or this Court will affirm the lower court's decision and precipitate a return to an earlier era.[1]

[1] *Amici* firmly believe that the loss of voluntary affirmative action as a remedial tool will most definitely mean reversal of progress already made. *Amici* would point out only that a recent Association of American Medical Colleges report stated that the proportion of first year Black medical students is the lowest it has been since 1970. The report said that Black students make up 6.4% of the first year class in the 124 medical schools in the country, as against 6.7% last year. This drop occurred despite the fact that most admission decisions in this year's class were made prior to the Court's ruling in *Regents of the University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733 (1978).

This case has striking parallels to the *Civil Rights Cases* of 1883, 109 U.S. 3 (1883). Speaking for the majority in the *Civil Rights Cases*, *supra*, Justice Bradley stated that there must come a time when the newly freed slave "takes the rank of mere citizen and ceases to be the special favorite of the laws." 109 U.S. at 25. Given the oppressive conditions facing the newly freed slaves, this transformation of civil inequality into formal legal equality is a remarkable example of judicial legerdemain. It contributed to what, in *Bakke*, Justice Powell called the virtual strangulation of the Equal Protection Clause in its infancy by "post-war judicial reactionism." *Regents of the University of California* v. *Bakke*, —— U.S. ——, 98 S. Ct. 2733, 2749 (1978). It also led to the relegation of the freedmen into "second class citizenship," as Justice Harlan prophesied in his dissent in the *Civil Rights Cases*.[2] The social and political consequences of that abandonment cast a well-documented shadow that is still lengthening over this nation's history.

In a very real sense, this Court is challenged to meet its historic responsibilities to enforce the written Constitution. The Bradley Court rewrote history and ignored social reality. This Court must not repeat the same tragic errors.

This Court must not construct a judicial rationale for the abandonment of affirmative action by pretending that equality for racial minorities has been achieved. The

[2] 109 U.S. at 26, *United States* v. *Jefferson County School Board of Education*, 372 F.2d 836, 873 (5th Cir. 1966).

Court must "grasp the nettle",[3] and acknowledge the truth of what Justice Marshall said in *Bakke*:

> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro. . . . 98 S. Ct. at 2802.

Affirmative action programs for Blacks and other racial minorities are not preferential treatment or "reverse discrimination", but rather a step toward the reversal of discrimination.

The majority ruling in the *Civil Rights Cases* is explicable only in view of the hostility of most whites toward the newly freed slaves. *Amici* fear that such conditions as inflation, unemployment, and a contracting economy, could serve as a politically expedient excuse for the betrayal of the constitutional promise of equality for racial minorities. That promise was renewed after the angry outbursts of Watts, Newark, and Detroit, which marked what to date has been known as the "Second Reconstruction." It may be politically expedient for the government and the courts to refuse to face the qualitatively different and harsher realities of institutionalized racism still facing Blacks and other racial minorities.[4]

In this historically significant case, which may have an adverse impact on millions of minorities and women, the issues go beyond the mechanical interpretations of

[3] See opinion of Justice Wisdom in *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729, 730 (5th Cir. 1965).

[4] Similarly, women coming into the work force are often the victims of institutional sexism and blamed for "taking men's jobs." Indeed, the outcome of this case may well have an adverse impact on affirmative action for women also. A portion of Kaiser's affirmative action plan not challenged by Respondents contains a 5% goal for women.

the anti-discrimination principle within Title VII and Executive Order 11246. Neither of these was promulgated in a vacuum. Both were born out of the great social upheavals of the late fifties and early sixties that followed the Court's historic decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

In a very real sense, Title VII and the Executive Order were passed and promulgated to fulfill the broken promises of the Civil War Amendments, in particular, the Thirteenth and Fourteenth Amendments.[5] The rights created by Title VII and the Executive Order for minor-

[5] The fact that the original Title VII in 1964 was passed pursuant to the commerce clause alone, and not pursuant to the commerce clause and Section 5 of the Fourteenth Amendment or Section 2 of the Thirteenth Amendment, does not mean that Title VII was not intended to enforce the mandates of those amendments. The 1963 Congress inherited the "state action" doctrine of the *Civil Rights Cases* of 1883, as well as Justice Bradley's evisceration of both the Thirteenth and Fourteenth Amendments. The Representatives and Senators who debated the Civil Rights Act of 1964 were clearly mindful of these legacies. Some wanted to accommodate them and some desired to challenge them. *See, e.g.*, the discussion on this point in Senate hearings on Title II, the public accommodations section of the Act. Then Attorney General Robert Kennedy presented the Administration's position supporting the use of the commerce clause to circumvent the Bradley rationale:

> We base this on the Commerce Clause which I think makes it clearly constitutional. In my personal judgment, basing it on the 14th Amendment would also be constitutional . . . .
>
> . . . I think that there is argument about the 14th Amendment basis—going back to the 1883 Supreme Court decision [Civil Rights Cases], and the fact that there is not state action—that therefore Congress would not have the right under the 14th Amendment to pass any legislation dealing with it . . . . I think that there is an injustice that needs to be remedied. We have to find the tools with which to remedy that injustice. . . .
>
> There cannot be any legitimate question about the Commerce Clause. That is clearly constitutional. We need to obtain a remedy. The Commerce Clause will obtain a remedy and there won't be a problem about the constitutionality. . . . Hearings before the Senate Committee on Commerce on S.1732, 88th Cong., 1st Sess., parts 1 and 2.

ity and white citizens must be interpreted in this context.

Only by acknowledging the national commitment to racial equality created by the Wartime Amendments, particularly the Thirteenth Amendment, can this Court put into the proper perspective the personal and class rights that Respondents assert were violated. Since this case involves actions of private parties in private employment decisions, of necessity it involves a reexamination of the Thirteenth Amendment, which the total Court in the *Civil Rights Cases, supra,* recognized as giving Congress and all the coordinate branches of government the power to directly and primarily enforce.

Amici contend that the actions taken by Kaiser and the United Steelworkers were fully protected by the Thirteenth Amendment, and that Respondents have no rights which contravene the rights of minorities protected by the Thirteenth Amendment.[6]

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[6] Because of the extraordinary interest in the issues presented in this case, a large number of *amicus* briefs have been filed. The following statement of principles will apprise the Court of the mutual support of many *amici* for a number of basic positions in defense of the affirmative action program in controversy in the present case.

1. This country cannot attain true equality of opportunity without affirmative action.

2. Title VII and the anti-discrimination principle must be understood in the context of our nation's history of discrimination against non-white people and women and its resulting national patterns of underrepresentation and inequality in the workforce.

3. As explained by the Equal Employment Opportunities Commission in its "Guidelines on Affirmative Action," which, as a result of Executive Order 12067, states the position of the executive branch: "Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunities in the workplace . . . . Voluntary affirmaitve action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII."

4. Title VII and the anti-discrimination principle should not be a search exclusively for villains and villainous acts. On the contrary, the focus should be on current unequal conditions and providing mechanisms for their elimination.

5. The remedies for discrimination against minorities and discrimination against women are inextricably linked.

6. Voluntary action on the part of employers and unions is instrumental in redressing the pervasive patterns of discrimination adressed by Title VII and Executive Order 11246, but this objective cannot be achieved if employers and unions must first expose themselves to charges that they are violating the very laws they are seeking to implement.

7. Long experience shows that, in many instances, appropriate "employment tools which recognize the race, sex, or national origin of applicants and employees" (EEOC's Affirmative Action Guidelines), such as those at issue in this case, are presently the only means by which true equal opportunity can be achieved.

8. Endorsement of voluntary affirmative action in no way diminishes the need for judicially mandated or administratively required affirmative measures which provide the necessary incentive for voluntary action.

ARGUMENT

I. THE THIRTEENTH AMENDMENT PROTECTS EFFORTS TO OVERCOME BADGES AND INCIDENTS OF SLAVERY.

By 1883, the implementation of the Thirteenth and Fourteenth Amendments had come full circle. The Reconstruction Congress, which passed these amendments and the sweeping legislation designed to protect the civil and political rights of freedmen, had been decimated by the elections of 1876 and the Compromise of 1877. The newly freed slaves enjoyed few, if any, of the rights allegedly guaranteed to them. Indeed, they faced conditions similar to those they had suffered in slavery.

In 1883, several constitutional challenges to the Civil Rights Act of 1875, which prohibited discrimination in

public accommodations or public places of amusement, came before the Supreme Court. In the *Civil Rights Cases* of 1883, *supra*, the Court had to answer a fundamental question: Did Congress have the power to pass legislation to enforce all of the substantive rights mandated by either or both the Thirteenth and Fourteenth Amendments?

The Court's answer reflected the times. Chief Justice Bradley, writing for the majority, created the "state action" doctrine and disposed of the Fourteenth Amendment as a meaningful provision to vindicate the rights of the newly freed slaves. He wrote that the Fourteenth Amendment's enforcement powers only allowed congressional action that was secondary and corrective of discriminatory state actions. By implication, substantive rights, guaranteed by the Fourteenth Amendment, could not be protected unless affected by state action.

A. In the *Civil Rights Cases* of 1883, the Entire Court Agreed That The Thirteenth Amendment Was Designed To Abolish Slavery as well as its Badges and Incidents. The Bradley Majority Disagreed With Harlan On The Nature of Such Badges and Incidents.

Justice Bradley found that the Thirteenth Amendment was not restricted to the mere prohibition of discriminatory action:

> By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. *Civil Rights Cases, supra,* 109 U.S. at 20.

In addition, Justice Bradley held the Thirteenth Amendment to have a "reflex character, establishing and declaring civil and political freedom throughout the United States." *Id.* He assumed that Congress was clothed with "the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Id.*

Justice Harlan fully agreed with this characterization. His vehement dispute was with how to define and what constituted the badges and incidents of slavery. For Justice Bradley, the badges and incidents of slavery were limited to those legal disabilities imposed on slaves—such as not having the right to sign and enforce a contract, or purchase and inherit property—the literal trappings of human bondage.

Justice Harlan understood "badges and incidents" to refer to all discrimination on account of race. He believed that the Thirteenth Amendment gave Congress the power to legislate against those discriminations

> I do hold that since slavery, as the court has repeatedly declared, was the moving or principal cause of the adoption of that amendment and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to free men of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *on account of their race*, of any civil rights enjoyed by other free men in the same state. 109 U.S. at 36.

Justice Harlan further reminded the Court of its position nine years earlier in the *Slaughter House Cases*, 109 U.S. at 36-37. The Court had disapprovingly characterized certain state laws restricting the right to contract of people of African descent. These laws excluded them from many "occupations of gain" and prevented them from freely traveling. The Court said that this:

> imposed upon the colored race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value. *Id.* at 37.

There was no doubt that such laws contravened the Fourteenth Amendment. As to the Thirteenth Amendment, Justice Harlan rhetorically asked:

> Can there be any doubt that all such legislation might have been reached by . . . [direct] power to enforce the thirteenth amendment? Would any court have hesitated to declare that such legislation imposed badges of servitude in conflict with the civil freedom ordained by that amendment? *Id.*

Only Justice Harlan gave a meaning to the concept of badges and incidents of slavery that gave substance to the Thirteenth Amendment as a charter "declaring civil and political freedom throughout the United States." 109 U.S. at 20.

B. Justice Harlan's Broad Understanding of What Were Badges and Incidents of Slavery Was Based On His Belief That the Thirteenth Amendment Overruled the Theory of Racial Inferiority Enunciated In the *Dred Scott* Opinion.

Justice Harlan had understood from "repeated declarations" by the Court that the Thirteenth Amendment was enacted to abolish an institution that *"rested wholly upon the inferiority as a race, of those held in bondage"*. From this he concluded that discrimination based on theories

of racial inferiority was a substitute for slavery and as such, a badge and incident of slavery. 109 U.S. at 39.

Central to this conclusion was his view that the passage of the Thirteenth Amendment completely overruled the infamous opinion in *Dred Scott* v. *Sanford*,[7] 60 U.S. 393 (1856).

Thirty years later, Justice Harlan paraphrased Chief Justice Taney's odious characterization of the Negro race in that case:

> . . . '[T]hey had for more than a century before been regarded as beings of an inferior race, and altogether unfit to associate with the white race, either in social or political relations and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for this benefit;' That he was 'bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it;' and that 'this opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion. 109 U.S. at 31.

For Justice Harlan, the Thirteenth Amendment outlawed all the badges and incidents of slavery that were based on the racial inferiority and white supremacy theories enunciated in *Dred Scott*, *supra*. The Bradley opinion failed to even mention or acknowledge this fact.

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[7] See Kinoy, The Constitutional Right of Negro Freedom. 21 *Rutgers Law Review* 387 (1967).

C. A Majority of the Supreme Court Adopted Justice Harlan's Formulation of the Badges and Incidents of Slavery in *Jones* v. *Alfred H. Mayer Co.* and *Runyon* v. *McCrary*.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968), a majority of the Supreme Court reminded the nation that " '[b]y its own unaided force and effect', the Thirteenth Amendment 'abolished slavery and established universal freedom.' "[8]

Writing for the majority, Justice Stewart ruled that "racial discrimination which herds men into ghettos" is a "relic of slavery" prohibited by legislation passed pursuant to Section 2 of the Thirteenth Amendment, 392 U.S. at 442-3.

The Court did more than say that the Thirteenth Amendment protected Blacks and other racial minorities[9]

[8] In *Jones*, the Court upheld an effort by black citizens to invoke federal equity power to restrain racial discrimination by private individuals in the sale of real estate. The Court found statutory authority for this exercise of federal judicial power in one of the original Reconstruction Statutes, the Civil Rights Act of 1866. Section one of this Act provided that "citizens of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . ." In resting judicial action upon this statutory basis the Court was forced to face the ultimate question of the source for Congressional legislation in the area of Negro rights in the power created by the Thirteenth Amendment " 'to *pass all laws necessary and proper* for abolishing all badges and incidents of slavery in the United States.' " Arthur Kinoy, "The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on *Jones* v. *Alfred H. Mayer Company*," 22 Rutgers L. Rev. 537, 538-539 (1968) (footnotes omitted).

[9] *Amici* believe that other racial minorities of color suffer from the badges and indicia of slavery imposed on Blacks. *Amici* agree with the views propounded by *Amici* Rutgers University, Rutgers Alumni Association, and the Student Bar Association of the Rutgers Law School in their brief in *Bakke, supra*, where it is stated:" American Indians, Hispano-Americans, and Asian-Americans are also persons of color belonging to racial classes whose position makes them subject to the badges and incidents of servitude. Social scientists have defined minorities as groups of people 'who, because of

from purely private racial discrimination in the sale of property. To a large degree, the Court embraced the broad Harlan analysis of the rights created and protected by the Thirteenth Amendment. In the courageous language of Justice Stewart, the Court pointed out:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to 'go and come at pleasure' and to 'buy and sell when they please'—would be left with 'a mere paper guarantee' if Congress weer powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man

their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and *unequal treatment*, and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of society.' G. Simpson & J. Yinger, *Racial and Cultural Minorities; An Analysis of Prejudice and Discrimination* II (4th ed. 1972) (emphasis added). Pursuant to Title VII of the Civil Rights Act of 1964, the United States Equal Employment Opportunity Commission requires reporting firms to provide periodic employment statistics on blacks, orientals, American Indians, and Spanish surnamed Americans. Employer Information Report Form EEO-1. These groups fit the social science definition, as the EEOC has recognized. Although in this brief *Amici* emphasize the excluded condition of black Americans, the situation of these other racial minorities replicates in varying degrees the situation of blacks. (p. 7)

> can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep. 392 U.S. at 441-443.

These words are remarkably similar to those of Justice Harlan in his dissent in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). Much of the argument in *Jones* was reinforced by the majority in *Runyon* v. *McCrary*, 427 U.S. 160 (1976):

> The statutory holding in *Jones* was that the '[1886] Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property,' 392 U.S. at 436, 88 S. Ct., at 2201. One of the 'rights enumerated' in § 1 is 'the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . .' 14 Stat. 27. Just as in *Jones* a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees. 427 U.S. at 170.

Both *Jones*, *supra* and *Runyon*, *supra* reestablished the proper role of the Thirteenth Amendment in helping this nation overcome its legacy of slavery and racism. In much the same way that the racial exclusion of Blacks from white neighborhoods is a relic of slavery, so is the virtual exclusion of Blacks and other non-white minorities from the skilled trades a badge and incident of slavery. Just as in *Jones*, *supra*, where the Court found that 42 U.S.C. § 1982 protects Blacks and minorities from racial discrimination in the sale or lease of private

housing, so does the Thirteenth Amendment protect efforts by parties that are designed to overcome and abolish the badge of slavery manifested by the current underrepresentation of minorities in the skilled trades.

II. INSTITUTIONAL DISCRIMINATION AGAINST RACIAL MINORITIES AS CURRENTLY MANIFESTED IN THEIR DISPROPORTIONATE UNDERREPRESENTATION IN THE SKILLED TRADES IS A BADGE AND INCIDENT OF SLAVERY.

A. Institutional Discrimination Against Racial Minorities In The Skilled Trades Continues Through The Present.

Amici use the phrase "institutional discrimination" [10] against racial minorities to refer to the phenomenon whereby this nation's institutions almost reflexively grant advantages to whites and impose disadvantages upon Blacks and other racial minorities. Institutional discrimination against racial minorities continues to flourish in the "skilled trades," even though some progress has been made as a result of Executive Order 11246 and Title VII. In May, 1976, the United States Commission on Civil Rights (hereinafter Civil Rights Commission) issued a report entitled *The Challenge Ahead: Equal Opportunities in Referral Unions.* This report (hereinafter referred to as the Report) is of particular relevance in this case because it is the referral unions, particularly the building trades unions, which have historically provided training for trade craftsmen. Further, it was these referral unions that Kaiser apparently relied on to refer trained craftsmen to them in Gramercy prior to the institution in 1974 of the training program at issue in this case.

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[10] *See* J. Feagin and C. Feagin, *Discrimination American Style: Institutional Racism and Sexism*, Chs. 1-3, 6 (1978); U.S. Commission on Civil Rights, *Racism in America: How to Combat It* (1970).

The Civil Rights Commission found in its examination of the statistics in the 1974 EEO-3 reports of 15 major building trades unions that, at most, minorities constituted 6.2% of journeymen working in the construction industry in 1972, and more likely only 5.5%.[11] In view of the time required to complete an apprenticeship program, usually two to four years (Report at 53), it is unlikely that these statistics had changed significantly by 1974, when Petitioners, Kaiser Aluminum and the United Steelworkers, negotiated the contract provision challenged herein. It is also safe to state, as did the Civil Rights Commission in 1976, that:

> [T]he percentages of minorities . . . among journeymen in the construction industry are extremely low, whether compared with population or relevant labor force statistics. Report at 52.

The Civil Rights Commission concluded that the "extremely low" percentages of minorities within the construction industry resulted from two sources: (1) overt discrimination and (2) institutional discrimination. Such overt discriminatory practices included, among other things, "white only" clauses in many union constitutions until the mid-1960's and exclusion of minorities from participation in apprenticeship examinations. The Report recognized that while overt discrimination is not as "widespread as it once was, it is far from uncommon" (Report at 92) and that although a few "progressive locals" have made the entry of racial minorities a "relatively routine matter" *id.*, the most common form of discrimination which accounts for the continued exclusion of racial minorities is the use of seemingly neutral practices that disproportionately exclude them.

[11] The difference in percentages reflects irregularities in data provided by the unions on the EEO-3 forms, including: failure to report; overestimation of minority membership; categorical combining of non-construction and semi-skilled workers with construction journeymen; combining apprentices with journeymen; and failure to report actual referral opportunities. Report at 38.

As for institutional discrimination, the Report states:

> Institutional discrimination occurs when policies and practices used in selecting apprentices and applicants for membership and employment have an adverse impact on minorities and women, even when these policies and practices are not intentionally applied in a discriminatory manner. The adverse effect these policies and practices have on minority groups may have been caused by the past intentional discriminatory policies of a union or by economic, educational, and social disparities in the society. Whatever the cause, the effect is exclusion from employment. Report at 64.

The Report identified, and discussed at length, four common institutional practices within building trade unions which have caused the virtual exclusion of significant numbers of racial minorities: (1) membership selection practices; (2) restrictions on the size of membership; (3) methods of recruitment; and, (4) examinations. Report at 65-92.

In summary, the Civil Rights Commission concluded:

> The effect of intentional and direct employment discrimination in the building trades continues to be severe. The proportion of unions that neither discriminate directly nor intentionally or that do not continue to use widely practiced institutional mechanisms that adversely affect the employment opportunities of minorities and women is unfortunately quite small. Report at 94.

B. The Current Disproportionate Underrepresentation of Minorities in the Skilled Trades Reveals Past and Continuing Legal Disabilities on the Rights of Minorities to Contract in Violation of 42 U.S.C. § 1981.

If today, minorities make up close to 20% of the nation's population, but make up only 5.5% of the jour-

neymen in the skilled building trades, it is only logical to state that some mechanism has been operating to cause and perpetuate this disproportionate underrepresentation.

Amici will not repeat here the history of the exclusion of minorities from the skilled trades.[12] *Amici* would point out that such disabilities as "white only" clauses in skilled trade unions' constitutions, the exclusion of minorities from taking journeymen's exams, or the exclusion of minorities from hiring halls[13] severely impaired minorities' rights to contract for jobs in the skilled trades.

Even Justice Bradley, in the *Civil Rights Cases, supra*, conceded that placing burdens on the making of contracts was an "incident of the institution" of slavery that Congress identified and outlawed by passing the Civil Rights Act of 1866 (42 U.S.C. § 1981). Although after 1883, this Act was no longer used by the courts to vindicate the rights of minorities (thus discouraging actions to enforce it), there can be no doubt that massive and unanswered violations of its provisions occur daily. If the 1866 Civil Rights Act, which was not "rediscovered" as a basis of jurisdiction for employment discrimination until *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), had been consistently enforced over the years so as to invalidate racially motivated refusals to contract for skilled trades jobs, or enforced so as to have fought craft unions that placed obstacles in the way of minorities' rights to join the unions, the current underrepresentation would most likely not be as extreme as it is today and affirmative action would not be necessary. This identifiable incident of slavery still perpetuates the underrepresentation of minorities in the skilled trades.

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[12] *See* Brief *Amicus Curiae* of the NAACP Legal Defense and Education Fund, Inc., submitted in this case.

[13] *See* part A of this section of the argument.

III. THE CONSTITUTIONAL CONTEXT IN WHICH TITLE VII AND EXECUTIVE ORDER 11246 MUST BE INTERPRETED IS ONE WHICH EFFECTUATES THE MANDATE OF THE THIRTEENTH AMENDMENT TO ERADICATE THE BADGES AND INCIDENTS OF SLAVERY.

A. Executive Order 11246 and Title VII Cannot Be Read to Contravene the Dictates of the Thirteenth Amendment.

Although Title VII was not passed pursuant to the Thirteenth Amendment, the time-honored principles of this country's constitutional government require the courts to interpret all statutes and executive orders consistently with the provisions of the Constitution. If a statute or executive order is inconsistent with any portion of the Constitution, or if it is applied in such a manner as to be inconsistent with the Constitution, then it cannot stand. *Marbury* v. *Madison*, 5 U.S. 103 (1803).

Title VII, therefore, cannot be constitutionally interpreted by this Court unless the interpretation is consistent with every aspect of the Constitution, which involves the mandates of the Thirteenth Amendment. Similarly, under Executive Order 11246, the Presidential power to further federal interests in the procurement of goods or services also must be consistent with the Constitution, including the mandates of the Thirteenth Amendment.

Furthermore, the Thirteenth Amendment is self-executing. It requires no implementing legislation for its enforcement.

> By its own unaided force and effect, the Thirteenth Amendment abolished slavery, and established universal freedom. *Civil Rights Cases, supra, Jones* v. *Alfred H. Mayer Co., supra* at 438.

Because the Thirteenth Amendment is self executing, it becomes automatically the context within which civil rights legislation must be interpreted.[14]

Because the interpretation of Title VII and Executive Order 11246 advanced by the courts below hinders the achievement of the Thirteenth Amendment objective to eliminate the badges and incidents of slavery, it cannot be sanctioned by this Court. That interpretation must be rejected.

B. When Read Consistent With the Thirteenth Amendment, Title VII and Executive Order 11246 Encourage Efforts to Overcome the Badges and Indicents of Slavery.

Title VII creates rights for all persons to be free of employment discrimination based on race, color, religion, sex, or national origin. This principle, and its parallel in other civil rights laws, did not emerge on the legal landscape merely because of abstract notions of natural justice. Title VII was passed against a factual backdrop of an aroused citizenry no longer tolerant of systematic, pervasive, and unabashed discrimination against the descendants of this nation's slaves. Although the race relations of this country have undergone some positive changes in response to the great push for civil rights in the 1960's, overt racism still persists; covert racism is still widely practiced; and relatively pervasive basic ignorance of the realities of racism still flourishes. The

[14] The Thirteenth Amendment reaches private employment contracts and justifies prohibitions against racial discrimination in that context. *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Jones* v. *Alfred H. Mayer Co.*, *supra* at 441 n.78. While these cases upheld Congressional legislation that may be appropriate under the Thirteenth Amendment, both cases indicated that the Thirteenth Amendment does not require implementing legislation. The Thirteenth Amendment is "an absolute declaration that slavery shall not exist in any part of the United States." *Civil Rights Cases*, *supra* at 28. *See* Section I, *supra*.

effects of continuing white supremacist attitudes and practices are all too apparent in any review of the social and economic indicators of equality.[15]

The concept of affirmative action has developed as a critical theory for moving the nation beyond a mere commitment to non-discrimination to a means for remedying the many current expressions of this nation's history of slavery, white supremacy, and racial discrimination. Affirmative action programs are remedial tools responding directly to this historic, negative, and stigmatic use of race.

The ruling of the court below denies this history. Its premise is that all discrimination is the same, despite the historical reality to the contrary. All discrimination is not the same. White people simply have not, do not, and will not suffer from the affirmative use of race in ways which should cause this Court to restrict racial affirmative action programs.

Amici contend that while Respondents have rights under Title VII and Executive Order 11246,[16] Respondents' rights do not outweigh the constitutional protection afforded the Petitioners pursuant to the Thirteenth Amendment to implement the affirmative action plan challenged herein. Contrary to the demands of the Thirteenth Amendment, the court below would interpret Title VII to forbid voluntary effective measures aimed at eliminating the "badges and incidents of slavery." It would make voluntary race conscious devices designed to end the overrepresentation of whites in preferred areas of employment unlawful. It would make the voluntary efforts to build a new system free of the institutional

[15] See, *e.g.*, United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (August, 1978).

[16] See *McDonald* v. *Santa Fe Transportation Co.*, 427 U.S. 273 (1976).

racial discrimination which today dominates employment relations in this nation illegal.

It is the need to undo the badges and incidents of slavery which provide the basis and justification for reconciling the competing principles argued by the parties in this case. On the one hand, all people have the right not to be discriminated against on the basis of race; on the other hand, this nation is constitutionally committed to eliminating the still pervasive effects of slavery. To achieve this end, Petitioners must be permitted to use race in affirmative ways to effectuate the goal of the Thirteenth Amendment.

C. The Interpretation of Title VII and Executive Order 11246 by the Court Below Defeats Rather Than Effectuates the Mandate of the Thirteenth Amendment.

(1) *The court improperly searched for villains and victims.*

The trial court below erred in making two assessments: (1) that those who would participate in the benefits of affirmative action programs must show that they have been victims of past discriminatory conduct by the proponents of the affirmative action plan, and (2) that the proponent of an affirmative action plan using race as a criterion must reveal itself as a "villain" in the past by demonstrating evidence of its prior practice of racial discrimination. These conclusions of the court below evade the purposes of the Thirteenth Amendment.

This Court has properly identified two different but interrelated purposes of Title VII. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417-18, 421; *Franks* v. *Bowman*, 424 U.S. 747, 767 n. 27, 771 (1976). The first and primary purpose is "prophylactic," designed to encourage employers and unions to change any and all of

their employment practices that create barriers to equal opportunity. The second purpose is compensatory, and allows individuals to be "made whole" for specific violations of the law.

The prophylactic purpose emphasizes the eradication of *conditions* caused by barriers to equal opportunity. The "make whole" purpose stresses the rights of identified *victims*.

As Justice Stewart recognized in *Albemarle*, *supra*, the threat of "make whole" remedies provides a spur or catalyst to the achievement of the prophylactic objective of Title VII. Conversely, if prophylactic measures are taken, discriminatory conditions will have been eliminated so that fewer individuals will need to be made whole. This case involves voluntary action, spurred by the threat of "make whole" remedies, pursuant to the prophylactic purposes of Title VII.

Title VII of the 1964 Civil Rights Act promotes the adoption of voluntary remedial affirmative training, hiring and promotional schemes. Courts have ordered affirmative action under Title VII, including race conscious temporary remedies, such as preferences, goals and timetables in hiring and promotion.[17] Consent decrees approved by the courts have also included such provisions.[18] Further, the determination that affirmative action is also required under Executive Order 11246 and conciliation

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[17] *Commonwealth of Pennsylvania* v. *O'Neill*, 473 F.2d 1029 (3d Cir. 1973); *Southern Illinois Builder's Assoc.* v. *Oglivie*, 471 F.2d 680 (7th Cir. 1972); *Assoc. General Contractors of Mass. Inc.* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Crater* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972), *cert. denied*, 406 U.S. 950 (1972); *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355 (1977).

[18] *United States* v. *Allegheny Ludlum Industries, et al.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

agreements under Title VII of the Civil Rights Act has been given the approval of the courts.[19] And, in applying the intent and purposes of Title VII and Executive Order 11246, recognition has been given to the appropriateness of a group remedy. The validity of a group remedy, in contrast to a requirement that a prospective beneficiary of an affirmative action program establish that he has been the victim of past racial discrimination at the hands of the sponsor of the program is not without justification.[20] Indeed, the Wartime Amendments, including the Thirteenth, have been construed to transcend the limitations of race.[21] It is virtualy undeniable that race and the concommitant notions of inferiority—with regard to Blacks—was a vital underpinning of the institution of slavery. The effects of racial discrimination were imposed upon the injured parties as a group. Race was the sole determining factor. It was race and race alone that was responsible for the underrepresentation of Blacks and other racial minority groups in the specialized crafts.[22] Therefore, if the effects of such racial discrimination as reflected in craft membership is ever to be eliminated, then we need not identify individual "vic-

[19] *Contractors Assoc. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

[20] *See* generally, Askin, F., *Eliminating Racial Inequality in a Racial World*, 2 Civil Liberties L. Rev. (1975).

[21] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

[22] Although the concept of racial inferiority is a "badge and incident of slavery", it is anomolous to state that Blacks were not denied the opportunity for skill development during slavery, but as a facet of the "peculiar institution" were required to serve as skilled craftsmen to maintain the plantation as an ongoing, viable economic entity. Only as freed slaves did craft participation on the part of Blacks become an issue. In the marketplace of skilled labor, Blacks were not allowed to compete, thus preventing them from continuing as skilled craftsmen although as slaves, skilled services were required. Exclusion of freed slaves from skilled trades was justified on the basis of Black inferiority, a "badge and incident" of slavery.

tims" or "villains". It should be sufficient to recognize that a class of people has been systematically ostracized on the basis of race and if their current underrepresentation is to be remedied, then race alone is necessary to identify the target population for purposes of remediation.

The standard for an employer seeking to bring his work force in compliance with Executive Order 11246 [23] and Title VII [24] is not "proof of past discrimination." To require that an employer prove intentional discrimination against himself *completely subverts* the congressional intent of Title VII, and the underlying intent of the Executive Order. The Equal Employment Opportunity Commission seeks compliance with Title VII under a reasonable belief standard, and §§ 703(a) and 703(d) are not prohibitions to affirmative, remedial, preferential remedies.

(2) *The court inaccurately characterized the facts in this matter as an employment seniority case.*

The majority opinion of the court below characterized the issues raised by this litigation as impacting upon seniority rights. The court focused upon the standards

[23] In speaking to his amendment to strike a provision transferring Executive Order enforcement to E.E.O.C., Senator Saxbe stated:

> The Executive Order should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required. 118 Cong. Rec. 1385. *See also, Contractors Assoc. of Eastern Pennsylvania* v. *Secretary of Labor, supra.*

[24] *Albemarle Paper Co.* v. *Moody, supra*, citing *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973); Title VII, Civil Rights Act, 1964, 2000 *et seq.*

for altering seniority rights as a consequence of remedying past discrimination under the "rightful place" theory articulated by the Supreme Court in *Franks* v. *Bowman, supra*, and then determined that absent a finding of past discrimination, all employees at the Kaiser Plant were in their "rightful place," "since none [had] obtained any unfair seniority advantage at the expense of any other." *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 266 (5th Cir. 1977). The court below concluded:

> Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and the USWA, or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus, violates Title VII. 563 F.2d 216 at 226.

Amici contend that seniority exists as a by-product of collective bargaining. It carries with it certain agreed to rights and privileges as determined between management and the collective bargaining agent which are protected by the Constitutional right to contract and the public policy favoring collective bargaining agreements.

The Court in *Franks* rejected the argument that the granting of seniority relief deprived other employees of "vested rights":

> This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. [Citations omitted] The Court has also held that a collective bargaining agreement *may go further, enhancing the seniority status of certain employees for the purposes* of furthering public policy interests *beyond what is required by statute* . . . even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. 424 U.S. at 778, 779.

The Court continued:

> The ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority,' is certainly no less than in other areas of public policy interests. *Id.*, at 779.

One of the most significant aspects of seniority is that it provides the means of determining the order by which both promotions and lay-offs may take place when all other factors appear to be equal. This case addresses neither the issues of promotion nor lay-off, but, instead, addresses those factors *other than seniority* which establish qualifications for advancement within the company.

The affirmative action program under review here must be seen as a training program, and, in that sense, educational. The Kaiser plan was designed to develop, within certain employees, skills which would permit them, as successful participants in the training program, to become eligible for advancement to job status as craftsmen, as opposed to that of lesser-skilled production workers. The means of selection for the affirmative action training program were tied to seniority only because of its convenience and availability as a selection criterion.

This is not a case in which a promotion roster was being altered, although courts have condoned the alteration of promotion rosters based upon race.[25] This is not a case in which hiring policies have been altered to accommodate racial minority groups; nor is this a case

[25] *Porcelli* v. *Titus*, 302 F. Supp. 726 (D.C. N.J. 1966) aff'd, 401 F.2d 1254 (3rd Cir. 1970).

where selection on the basis of race precludes non-participants in the program from ever achieving the goals and purposes of the program, that is, participation in the crafts. Access to the crafts has long been accomplished without the benefit of company-sponsored training programs. Indeed, this on-the-job training program was created only because of the underrepresentation of Blacks and other racial minorities in the crafts. The traditional methods for entrance into the crafts did not produce significant numbers of Blacks and other racial minority group members. In the face of this certainty, the company took it upon itself to train significant numbers of racial minorities for participation within the crafts.

No duty existed by virtue of seniority rights to train members of the class which predominated within the crafts. But where an employer determines upon analysis of his work force that he is potentially liable for unlawful discrimination under Title VII, it is his duty to correct the discriminatory situation voluntarily.

Both Executive Order 11246 and Title VII (706(b)) envision voluntary compliance in the enforcement scheme which the Supreme Court endorsed in *Albemarle Paper Co.* v. *Moody* (quoting from *U.S.* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). Consent decrees have also been sanctioned by the Court.

The specific language of 703(j) was emphasized by the court in *Contractor's Assoc., supra*:

> Possibly an employer could not be compelled, under the authority of Title VII, to embrace such a program, although 703(j) refers to percentages of minorities in an area work force, rather than percentages of minority tradesmen in an available trade work force. We do not meet that issue here, however, for the source of the required contract provision is Executive Order 11246. Section 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal. 442 F.2d at 172.

Assuming, but not admitting, that 703(j) in any way limits remedies under Title VII, the limitation is perhaps in the context of hiring, probably not promotion, and certainly not training programs. A careful reading of 703(j) suggests the only practice not required of employers is "hiring" in order to balance the "total number of percentages, of persons of any race, color, religion, sex or national origin employed by an employer in comparison with their representation in the work force." Training programs such as are at issue in the instant case, that are intended to alter the available work pool to include qualified Blacks, are not addressed by 703(j) of Title VII. And, more importantly, attempts to alter the work pool from which an employer obtains his personnel to overcome underrepresentation of Blacks and other racial minority group members are protected by the Thirteenth Amendment and cannot be thwarted by misplaced notions of seniority rights which ignore the strength of constitutional protection.

IV. GUIDELINES ON AFFIRMATIVE ACTION RECENTLY PROMULGATED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENUNCIATE FOR THE EXECUTIVE BRANCH COMPREHENSIVE AND PROPER STANDARDS GOVERNING FEDERAL CIVIL RIGHTS LAW WHICH ARE IN ACCORDANCE WITH THE MANDATES OF THE 13TH AMENDMENT.

A. EEOC's Affirmative Action Guidelines Are Based Upon the Commission's Reading of the Legislative Purpose of Title VII.

EEOC's newly enacted affirmative action guidelines (44 Fed. Reg. 4422 (Jan. 19, 1979) are explicit in their reading of the legislative history of Title VII:

> Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation and inferior treatment of minorities and women in many areas of life. Section 1608.1(b).

If the end of Title VII is to "improve the economic and social conditions of minorities and women" by overcoming widespread and diverse patterns of discrimination, the preferred means to achieve this objective is "voluntary action."

> . . . Congress strongly encouraged . . . persons subject to Title VII . . . to act on a voluntary basis to modify employment practices which constituted barriers to equal opportunity, without awaiting litigation or formal governmental action. *Id.*

Based on this understanding of the purposes of Title VII, Section 1608.1(c) of the guidelines declares its interpretation in furtherance of this legislative purpose:

> The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.

The seeming inconsistency created by the affirmative use of race, sex, or national origin necessitated the guidelines:

> Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with Title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of Title VII. Section 1608.1(a)

The Guidelines dispel any possible contradiction, not only by reference to the legislative purpose of the Act, but also by drawing upon knowledge that a failure to reconcile the competing principles would cause serious difficulties:

> The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of Title VII litigation. *Id.*

As noted in the joint opinion of Justices Brennan, White, Marshall, and Blackmun in *Regents of the University of California* v. *Bakke*, *supra*, in the context of Title VI:

> We have recently held that '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."' (Citations omitted). This is especially so when, as is the case here, the literal application of what is

> believed to be the plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose. 98 S. Ct. at 2774.

The interpretation advanced by EEOC's affirmative action guidelines properly "clarify and harmonize the principles of Title VII . . ." Section 1608.1(a). This statement by the executive branch should be given great deference. Not only because it is the view of the executive branch of a congressional act, and thus of at least co-equal weight with that of the judiciary (*see* part D of this argument), but also because it is amply supported by congressional debates.

Amici share EEOC's understanding of the legislative history of Title VII, as it is wholly consistent with this Court's ruling in *Griggs*, 401 U.S. 424, *Albemarle*, and *Franks*. *See* Section III, *supra*. EEOC's finding of the congruency of Title VII with Executive Order 11246 is also correct.

> The legislative history of the Equal Employment Opportunity Act of 1972 shows that Congress repeatedly rejected limitations on affirmative action under the Executive Order, including the goals and timetables approach that had become by that time a central feature of the implementation of the Order. . . . The Congress which acted to allow the Executive Order program to continue would not, in the same measure, invalidate it under Title VII. The statute should be construed to avoid such a contradictory conclusion, especially where such a conclusion would undermine the expressed Congressional purpose of opening employment opportunities to minorities and women who had in the past been denied such opportunities. 44 C.F.R. at 4423.

For a more detailed analysis of the 1972 Title VII debates, *amici* refer the Court to the *amicus curiae* brief submitted in this case by the NAACP Legal Defense and Education Fund, Inc.

Assuming for the purposes of argument that there are other possible readings of the legislative intent behind Title VII, *amici* contend that at best, those readings would lead to an ambiguous or ambivalent intent upon the part of Congress. As *amici* argued in Section I of this brief, in such circumstances the Court must interpret that ambiguity or ambivalence in accordance with the mandates of the Thirteenth Amendment so as not to erect barriers to the elimination of vestigial badges and incidents of slavery. EEOC's interpretation of the legislative history is consistent with the Thirteenth Amendment and should be embraced by this Court for this reason as well.

B. The Standards of Reasonableness Contained in EEOC's Affirmative Action Guidelines Give Employers, Unions, and Others Subject to Title VII the Legal Latitude and Protection Required to Encourage Voluntary Affirmative Action.

The standards spelled out by the guidelines reveal a practical understanding of the interests of those subject to Title VII's commands and of the existence of institutional discrimination.

The core of the guidelines is their "three R's" concept: reasonable self-analysis, a reasonable basis for concluding that action is appropriate, and reasonable action. Section 1608.4.

If the self-analysis (Section 1608.b(4)) discloses any one of the conditions described as a "reasonable basis for concluding that action is appropriate" (Section 1608.4 (b)), voluntary action which is "reasonable in relation to the problems disclosed by the self-analysis" (Section 1608.4(c)) may be taken. These "reasonable actions" include "appropriate employment tools which recognize the race, sex or national origin of applicants or employees" and "may include . . . practices which will eliminate" the conditions revealed by the self analysis. *Id.*

The circumstances under which one can conclude that voluntary affirmative action is appropriate are explained in Section 1608.3. Of particular relevance to this case is Section 1608.3(c) which explains that "historic restrictions" by other than the party taking affirmative action may cause the "available pool . . . of qualified minorities and women" to be "artificially limited." The section goes on to encourage voluntary action to overcome such circumstances, including training programs such as the one at issue in this case.

These standards do not in any way make the lawfulness of affirmative action hinge on the lawfulness of the prior conduct of the party taking affirmative action. (Section 1608.4(b); Section 1608.3.) Evidence of past discrimination of any kind by that party—even the existence of a "*prima facie*" case—is not a pre-condition for taking affirmative action.

C. EEOC's Affirmative Action Guidelines Do Not Condition Affirmative Action on the Existence of Evidence that the Law May Have Been Violated; They Recognize That the Interest of Parties Who Implement Affirmative Action Plans Is to Suppress and not to Produce Evidence of Their Own Discriminatory Actions and to Portray Themselves as Remedying "Societal Discrimination."

This case convincingly demonstrates and simple logic confirms that it is unrealistic to expect those who can be held liable for violating Title VII and the civil rights of minorities and women to come forth with evidence exposing themselves to such liabilities. It is far more likely that employers and unions will attribute existing segregated areas to discrimination by others or to acts which, though discriminatory in result, nonetheless were legal. Furthermore, in many cases, such attribution will be entirely accurate.

There is a "smoking gun" in this case: the clear evidence of past discrimination alleged by a government agency. Petitioners, the United States of America, have filed with this Court findings made in 1971 by federal compliance officers, acting pursuant to Executive Order 11246, that craft employment practices at Kaiser's Gramercy plant did not conform with the O.F.C.C.'s anti-discrimination requirements. (Brief of the United States of America on *Petition for Writ of Certiorari* at 18.) Additional findings by federal compliance officers in 1973 state that Kaiser had waived its prior experience requirements for whites, but not for Blacks who had applied for craft positions. *Id.* Furthermore, those experience requirements had not been validated. (1973 findings filed with this Court by the United States of America, at 1-2.) Were it not for the petition for *certiorari* to this Court, and the government's resulting decision to file these critical documents with the Court, this case might have proceeded under the illusion that there had been no past discriminatory acts by the Petitioners.

Although the "smoking gun" was not presented to the district court, there was overwhelming evidence of its existence: the repeated testimony that Kaiser and the Union were acting to conform to the requirements of Executive Order 11246 and Title VII (Jt. Ex. No. 2, p. 13, Tr. 41, 100, 104, 106, 108, 110), the glaring statistical disparity between Blacks in the skilled jobs (2%) and Blacks in the area's labor force (39%), and the absence of evidence validating the skill experience requirements.

Despite all of this evidence and the undoubted awareness of the existence of the "smoking gun," Kaiser has insisted throughout this litigation that it was completely innocent of any wrongdoing. It has consistently attributed the statistical disparities in its craft jobs to the discriminatory acts of others, labeling such conditions "societal discrimination." Only the Union has pressed some

of these arguments of possible past violations, which it now has chosen to abandon.[26]

Amici believe that both the union and the employer have a substantial interest by their affirmative action programs to curtail liability for past discrimination and to eliminate the badges of slavery. Nonetheless,

> . . . [N]o litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. It is not surprising, therefore, that no party fully analyzed the facts within the context of Title VII. 563 F.2d at 231 (Wisdom, J., dissenting opinion).

Reliance on employers and unions to marshal any evidence of their own misconduct, much less convincing evidence, which may give rise to massive civil liability and warranted public criticism is wholly misplaced.

The revelation of past discrimination in this particular case should not cloud the fact that parties are more apt to do as Kaiser has done—proclaim their innocence and blame their sorry statistical patterns on discriminatory conduct of others. However, as argued in Section II, *amici* fully agree that "societal discrimination" (a concept included in the term "institutional discrimination" used by *amici*) occurs and undoubtedly contributed

[26] The Union argued in the court below that the statistics created a *prima facie* case of discrimination against Kaiser. (Brief of United Steelworkers of America on *Petition for Writ of Certiorari*, at 3, n. 2.)

to Kaiser's segregated work force. Kaiser's position may in fact be accurate with respect to other Kaiser operations or similar industrial employers. The consequences of a position which prevents voluntary action to overcome societal discrimination were well-stated by Judge Wisdom:

> In the present case the problem is clear. The history of discrimination in the trades is a sorry record of continual exclusion of women and minorities. Yet how many of the excluded workers could prove that they had applied for and been refused crafts jobs or training? How many have been deterred by the knowledge of their exclusion from even attempting to find crafts jobs? In some circumstances it is possible to determine whether a particular person has been harmed by discrimination, and to provide relief to that person. Here we know the discrimination existed, statistics show that it was effective, but it is difficult to identify individual victims. That situation would prevail against Title VII suits directly against the discriminating unions or in situations similar to the one this case presents, where third parties seek to compensate for the discrimination. *The result would be a wrong without a remedy.* 563 F. 2d at 235-236 (emphasis added).

The concept of societal discrimination is useful to describe the phenomenon whereby discrimination in one economic sector affects outcomes in another sector. It also encompasses the fact that present discrimination and the effects of past discrimination in employment, education, housing, and other areas of private and public life interact with one another. *See, e.g.*, U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974). Its emphasis is on systems of discrimination and their resulting conditions, not on any need to identify individual entities which may legally be held responsible for causing those conditions.

When used in this sense, societal discrimination describes that kind of institutional discrimination which is

not subject to judicially compelled remedies—in Justice Wisdom's words, where "[t]he result would be a wrong without a remedy," 563 F.2d at 236. If this Court requires that some evidence of a legal violation be acknowledged to exist as a pre-condition for affirmative action, it would limit affirmative action to the scope of legal obligations: conditions that the law did not arguably *require* an employer to remedy, the law would not *permit* the employer to remedy voluntarily. The result would be to freeze societal discrimination into the social and economic order. The EEOC's guidelines, by eschewing any such limits on voluntary action, properly avoid erecting such barriers to the full implementation of the national commitment embodied in the Thirteenth Amendment.

D. EEOC's Guidelines on Affirmative Action, Issued Pursuant to Reorganization Plan No. 1 of 1978 and Executive Order 12067, Express the Interpretation of a Congressional Act by the Executive Branch and Should Be Accorded Great Judicial Deference.

As a result of the President's Reorganization Plan No. 1 of 1978 (43 Fed. Reg. 19807 (May 9, 1978)), reorganizing federal fair employment enforcement efforts, the EEOC has gained several new responsibilities and added authority, including replacing the Equal Employment Opportunity Coordinating Council (EEOCC).[27] EEOC's Affirmative Action Guidelines are the first action by the EEOC pursuant to its new powers.

[27] *Id.*, Reorganization Plan No. 1 of 1978, Section 6. The EEOCC, composed of the Department of Justice, Department of Labor, Civil Service Commission, Commission on Civil Rights and the EEOC, had been charged with responsibility for "developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency and eliminate conflict, duplication inconsistancy and competition," thereby improving the federal civil rights enforcement effort. 42 U.S.C. § 2000e-14.

In his message transmitting the reorganization plan to the Congress,[28] the President summarized its intent as follows:

> This plan makes the EEOC *the principal Federal agency* in fair employment enforcement . . . .
> It gives the Equal Employment Opportunity Commission— an agency dedicated solely to this purpose —*the primary Federal responsibility* in the area of job discrimination. . . . *Weekly Compilation of Presidential Documents* at 400, 404 (February 27, 1978) (emphasis added).

With respect to the abolition of the EEOCC and the transfer of its functions to the EEOC, the President stated:

> . . . [T]his plan places the [Equal Employment Opportunity] Commission at the center of equal employment opportunity enforcement. With these new responsibilities, the EEOC can give coherence and direction to the government's [fair employment] efforts. . . . Such direction has been absent in the Equal Employment Opportunity Coordinating Council. *Id.* at 402-403.

The absence of such leadership by the EEOCC on both substantive and procedural civil rights matters had caused the U.S. Commission on Civil Rights to call for the elimination of the EEOCC and the creation of a new body with the needed overall authority. United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974; Volume V, To Eliminate Employment Discrimination.* 617, 647-649.

The reorganization plan makes the EEOC the leader in setting and coordinating federal job discrimination laws. Its authority to do more than coordinate the fed-

[28] 5 U.S.C. § 906 provides that a reorganization plan goes into effect 90 days after its transmittal to Congress unless vetoed by either House of Congress.

eral fair employment effort is manifest in Executive Order 12067 (43 Fed. Reg. 28967 (July 30, 1978)), the Presidential decree implementing Reorganization Plan No. 1. Section 1-201 of this Order states that the EEOC "shall provide leadership . . . to the efforts of Federal departments and agencies" having equal employment opportunity enforcement responsibilities. Section 1-303 instructs these departments and agencies to "comply with all final rules, regulations, policies, procedures and orders of the EEOC." These formal grants of power are reinforced by Section 1-306, which empowers the EEOC to make budgetary recommendations to the Office of Management and Budget regarding "staff size and resource needs" of covered agencies. Consolidating EEOC's authority and providing for orderly decision-making in the event federal fair employment departments or agencies may disagree, Section 1-307 of the Executive Order creates a "dispute resolution mechanism" for taking disagreements to the Executive Office of the President. Section 1-307(a) stresses that this dispute mechanism "should be resorted to only in *extraordinary circumstances*" (emphasis added).

Pursuant to Executive Order 12067, drafts of the now final affirmative action guidelines were repeatedly circulated among and reviewed by government civil rights agencies before being adopted by the EEOC. *BNA Daily Labor Report*, September 19, 1978, at A-7; October 20, 1978, at A-6; December 11, 1978 at AA-1. Pursuant to Section 1-303 of Executive Order 12067, all federal departments and agencies must comply with its requirements.

These guidelines, therefore, are not only the administrative ruling of the agency charged with enforcing Title VII. They also declare fair employment law for the entire executive branch; they embody congressionally approved policy reasons demanding a coordinated and consistent executive fair employment enforcement effort; and they

state the executive branch's considered determination of the legislative history of Title VII and of its long practical administrative experience with enforcing fair employment laws.

Amici submit that the understanding of the amount of deference owed EEOC's judgments explained in *Gilbert* v. *General Electric Co.*, 429 U.S. 125 (1976), should be reexamined in light of the recent reorganization. Congress and the President gave EEOC civil rights leadership authority. That decision and EEOC's actions pursuant to it should be given "great deference". *Griggs* v. *Duke Power Co.*, *supra*, at 433-434; *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973); *Albemarle Paper Co.* v. *Moody*, *supra*, at 430-431. However, judged under even the restrictive (and as *amici* believe, outdated) standards in *Gilbert*, *supra* at 141-142, much less the more deferential (and now correct) standards in prior cases, the guidelines should get "high marks" (*Gilbert*, *supra* at 143).

Obviously, the guidelines are not "a contemporaneous interpretation of Title VII." *Gilbert*, *supra*, at 142. There was no need for affirmative action guidelines until those subject to Title VII began to realize in recent years that if they did not voluntarily act to correct conditions attributable to discrimination, they would be forced, potentially at great expense,[29] to take such corrective action in any event. The issuance of guidelines was appropriate only after the EEOC and the executive branch had acquired some experience in dealing with charges that those seeking to comply with Title VII were allegedly violating the very Act they were seeking to implement. The Guidelines were issued as soon as the

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[29] *Albemarle Paper Co.* v. *Moody*, *supra*, establishing the right to back pay even in the absence of bad faith, was decided only three and one half years ago, in June, 1975.

need became apparent and the executive branch could decide upon a comprehensive approach.[30]

Unlike other EEOC interpretations struck down by this Court in *Espinoza* and *Gilbert*, the affirmative action guidelines are consistent with—indeed, they even incorporate—the only pre-existing document which stated the position of the key civil rights enforcement agencies on affirmative action. Section 1608.4(c)(1) quotes the most important sections of the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies." 41 Fed. Reg. 38814 (September 24, 1976). There may exist other pronouncements issued by individual agencies stating views on the legality of affirmative action plants. To *amici*'s knowledge, however, no other pronouncements express the position of the principal civil rights enforcement agencies (the EEOC, the Department of Labor, the Civil Service Commission and the Department of Justice). While the 1976 policy statement is not nearly as comprehensive or specific as the 1979 guidelines, it is wholly consistent with the more definitive standards set forth in the guidelines.

The critical question with respect to the guidelines is their reading of the legislative purposes behind Title VII. Notably, these guidelines once again differ from other EEOC interpretations struck down by this Court. The affirmative action guidelines contain a reasoned and explicit statement of the fundamental purposes underlying Title VII. The administrative interpretations in *Espinoza* or *Gilbert* addressed discrete, limited areas. The guidelines at issue herein go to the very heart of the meaning of Title VII. This Court cannot equate the *Espinoza* and *Gilbert* situations of specific provisions

[30] A draft of the guidelines on this controversial issue was first released to the public in 42 Fed. Reg. 64826 (December 28, 1977) and subjected to extensive public comment.

having little legislative history with the definitive expression by the executive branch of its position on the overall purposes of Title VII.

The President, and by their consent to the reorganization, the Congress, have vested considerable new power in the EEOC. Their confidence in that agency and the real need for confidence in its judgments by the American public should be reflected in the great weight this Court should accord its guidelines promulgated pursuant to its Federal fair employment leadership authority.

V. CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to reverse the judgment of the court of appeals with instructions to the district court to dismiss the case.

Respectfully submitted,

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The *Affirmative Action Coordinating Center* (*AACC*) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations as well as other groups have joined as *amici* in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor and women's rights attorneys to discuss the *Weber* and *Bakke* cases.

AACC publishes an informational newsletter entitled *AACC News*. It has installed a national telephone "hotline" to receive and dispense information on affirmative action developments. It is preparing several educational publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communication and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The *National Conference of Black Lawyers* (NCBL) is an activist legal organization of Black Lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has been a leader in the battle against the growing concept of "reverse discrimination." NCBL strongly believes that the adoption of the principle of reverse discrimination by the courts and the continued attacks on voluntary affirmative action

plans, as in *Bakke* and *Weber*, represent a rejection of the nation's professed commitment to equality of opportunity. Without the right to initiate voluntary affirmative action plans to redress the effects of 400 years of racial discrimination, the goal of equal employment will continue to be a commitment with form but no substance.

The *National Lawyers Guild* was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as *amicus curiae* throughout the course of the *Bakke* litigation and in 1977, joined with the NCBL to cosponsor a *Bakke amici* roundtable attended by forty organizations.

The *Center for Constitutional Rights* (*CCR*) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

The *Center for Urban Law, Wayne County Neighborhood Legal Services*, represents persons in the Detroit metropolitan area. Its client population is composed of numerous racial and ethnic minorities unable to afford the price of conventional legal services. Many of its clients are non-white and the historical victims of societal and institutional racism. A large percentage of them are unemployed, underemployed, and frustrated by the employment market. Voluntary affirmative action programs

of the nature instituted by the appellants have aided this client population by opening a small avenue to secure employment and other benefits. To withdraw the benefits of these affirmative action plans just as small yet significant gains are occurring will have a devastating effect on them.

The *Affirmative Action Coalition of Chicago* is a coalition of minority and non-minority workers, students, professionals, and community people. Its goal is to build a broad affirmative action coalition within Chicago to educate and organize people to fight for equal rights in employment, education and community services. The *Weber* case has particular significance to Chicago since it has the largest concentration of steelworkers in the country and the largest percentage of minorities of any union district in the United Steelworkers of America. The Affirmative Action Coalition of Chicago sees the importance of extensive legal, as well as general political work in the fight around the issues in the *Weber* case. It firmly supports the belief that all forms of racial discrimination must be eradicated as remnants of slavery.

The *Affirmative Action Coalition of San Diego* (*AAC*) is a group of individuals and organizations that evolved out of the anti-Bakke movement. It has been involved in educating the community and the labor force about the *Bakke* decision and pending *Weber* case. The AAC of San Diego's position is that affirmative action in employment and education is legal and must be defended and expanded. It is administering a survey to over 60 organizations and institutions to determine the effect in San Diego of the *Bakke* decision.

The *American Association for Affirmative Action*, a non-profit organization, was founded in 1974. Men and women from protected and unprotected classes, corporations and educational institutions, representing both the public and private sector, work together through the

Association for effective affirmative action/equal opportunity in employment and education nationwide. As a national organization of professionals in the field of affirmative action/equal opportunity, the Association strongly endorses and supports the concept of voluntary affirmative action. It recognizes this vehicle as an essential tool in overcoming the effect of systematic discrimination and exclusion.

The *Black American Law Students Association (BALSA)* is the representative organization of Black law students in the nation.

The purpose for which BALSA was formed is to articulate and promote the professional needs and goals of Black American Law Students: to influence American law schools, legal fraternities and associations to use their expertise and prestige to bring about change within the legal system in order to make it responsive to the needs of the Black community. In keeping with this purpose, BALSA supports the maintenance of affirmative action programs within education and employment. Recognizing the reality that most Black Law Students are the products of affirmative action admissions programs, BALSA actively endorses programs that insure their employment. It is with this interest that BALSA has chosen to participate in an Amicus Brief that argues the legality of the voluntary affirmative action employment program as exemplified in the *Weber* case.

Black Economic Survival (BES) is a community-based organization that seeks jobs for minorities in the construction industry in the New York metropolitan area. BES joins this brief because it is acutely aware of the exclusion of Black and other minority workers from skilled jobs in the construction industry and elsewhere and from access to the training necessary to obtain such jobs. BES believes that affirmative action training programs such as that instituted at the Kaiser Gramercy

plant are essential if Blacks and other minority workers are ever to obtain access to skilled craft jobs. Without such programs, Blacks and other minority workers, who have for 200 years been the victims of a racist society, will continue to be excluded from a large segment of employment opportunities and from obtaining necessary skills.

The *Center for United Labor Action (CULA)* is a national organization devoted to the furtherance of unity and solidarity in the labor movement. Its members are trade union officials, rank and file workers, unemployed persons and activists in the community. The CULA, through its individual members and as an organization, has participated in fighting for affirmative action programs throughout industry. In 1972, the CULA was named a Party of Interest in one of the first major affirmative action battles in industry. In proceedings before the Federal Communications Commission on behalf of many telephone workers and the public, AT&T was charged with race and sex discrimination. The CULA strongly objects to the dangerous interference of the lower courts into the collective bargaining process of the United Steel Workers with Kaiser Aluminum. The *Weber* decision below infringes upon the right of a union to enter into negotiated agreements that are fully consistent with the spirit and needs of the union movement and its members. In defending the Gramercy program the United Steel Workers of America is upholding its own constitution and its obligation to represent all of its members. The present decision clearly endangers the right of the union to carry out the mandate of its constitution.

The *Charles Houston Bar Association of Oakland, California,* is a bar association of Black attorneys in Northern California which promotes the interests of justice and equality for all people. The Association joins

this brief in order to express its interest in ensuring that voluntary affirmative action programs are upheld throughout the country.

The *Christian Church (Disciples of Christ)* is a protestant denomination of some 1.2 million members. Through the resolutions of its General Assembly and the work of the Department of Church in Society, it has long been involved in social ministries in the fields of human relations and civil rights. On a number of occasions it has joined with others in filing *amicus curiae* briefs arguing for the rights of all persons before the law.

The *Church and Society Network, Inc.* is an independnt society of Episcopalians and other Christians involved in carrying out the Church's social mission in over 20 metropolitan areas in the United States. Church and Society Network joins as an *amicus* because its daily contact with ghetto neighborhoods makes it acutely aware of the physical and emotional devastation caused by the lack of employment opportunities for non-whites and women in this country, pointing to the urgent need to support all voluntary affirmative action efforts.

Church Women United (CWU) is an ecumenical movement of Protestant, Roman Catholic and Orthodox women seeking to witness for Christ in the church and in the world. CWU's support for affirmative action in order to achieve equal employment opportunity is validated not only by the United States Constitution, but by its commimtent to justice as religious women of fatih.

The *Coalition of Black Trade Unionists (CBTU)* is an organization consisting of representatives from 57 international and national unions with 27 chapters located across the country. CBTU filed an *amicus curiae* brief with this Court in the *Bakke* case. CBTU joins as an *amicus* in this brief because it considers that the *Weber* case has a tremendous potential adverse impact on af-

firmative action employment programs established for Blacks, other minority workers, and women across the country. CBTU especially supports the Thirteenth Amendment analysis taken in this brief because of its knowledge of the daily experience of its members, who suffer the impact of this country's two hundred years of racial discrimination.

The *Delta Ministry*, which functions in Mississippi, is a related movement to the National Council of Churches and is affiliated with the Divison of Church and Society. The Delta Ministry is involved in community development efforts, human rights, and educational and economic justice issues with the poor and Black communities in the state of Mississippi. The Delta Ministry joins as an *amicus* because its 15 years of involvement in economic justice issues, particularly in the struggle for equal employment rights for all Americans and especially those in the State of Mississippi, has demonstrated that affirmative action programs are essential if the badges and indicia of slavery are to be overcome in the area of employment.

Equal Opportunity Forum is a national equal rights publication reporting on classes protected by federal and state anti-discrimination laws. *Equal Opportunity Forum* joins as an *amicus* because of its understanding of the necessity for affirmative action programs including those of a voluntary nature, such as the one at issue in the *Weber* case. It considers these programs to be essential vehicles for the implementation of equal employment opportunities.

The *Farm Labor Organizing Committee (FLOC)* is a farm worker's union and community organization dealing primarily with Chicanos in northwestern Ohio, eastern Indiana, and southern Michigan. It is FLOC's experience that Chicanos and other minorities suffer from staggering rates of unemployment and underemployment.

FLOC joins as an *amicus* because it believes that an elimination or weakening of affirmative action programs would increase the suffering of Chicanos and other minorities who have extreme difficulty meeting the basics of life. FLOC is especially concerned about the thousands of farmworkers displaced by mechanization. Without affirmative action programs to increase the number of minorities employed generally, even fewer jobs would be available to these workers.

Filipinos for Affirmative Action, Inc. is an Oakland, California, based organization which seeks to accomplish the following goals and objectives: 1) to promote and project Filipino interests on all aspects of life that affect the general well-being of Filipinos; 2) to identify and evaluate the educational, social, and economic problems of Filipinos with the view to helping find appropriate relief and solutions; 3) to provide information and referral services to new immigrants, unemployed Filipinos, youth, and other segments of the Filipino community; 4) to encourage and assist in developing and implementing, in cooperation with appropriate agencies, affirmative action programs, and other such programs as well and better equip themselves toward attaining self-sufficiency; 5) to encourage and facilitate the greater exchange, compilation, and distribution of information concerning Filipinos on local, state, and national levels.

The *Health Coalition for Affirmative Action* is a New York based group of health professionals and health and civil rights organizations working to preserve and enlarge affirmative action programs in medical and nursing schools. The Health Coalition for Affirmative Action joins as an *amicus* in this brief recognizing the interdependence of affirmative action programs in employment and in education.

The *Indian Law Resource Center* is an educational and charitable organization based in Washington, D.C.,

devoted principally to the protection and enhancement of the legal rights of American Indians. One of the purposes of the Center is to seek the elimination of racial discrimination through education and legal efforts. Essential to this effort is the concept of "special measures" and affirmative action. For many years the federal government has established and implemented, albeit imperfectly, the policy of "Indian preference" regarding employment of Indian persons by various federal agencies. The Center is vitally interested in the protection and continuing affirmation of the Indian preference policy and other measures, such as affirmative action, designed to overcome the continuing social and economic discrimination experienced by American Indians and other nonwhite people.

The *Interreligious Foundation for Community Organization (IFCO)* is a public, charitable foundation whose 37 member board represents a cross-section of religious, educational and grass roots organizations. From its inception twelve years ago, its purpose has been to support programs to alleviate discrimination and to empower the poor. Recognizing that underrepresentation of minorities and women has a two hundred year history, a major focus of IFCO has been the implementation of strategies to combat institutional racism. The Board has consistently supported efforts to this end, including filing an *amicus curiae* brief in *Bakke*. It urges the Court to uphold all voluntary programs of affirmative action.

La Raza Legal Alliance (LRLA), is a national organization composed of Latino lawyers, law students and legal workers dedicated to the realization of social, economic, and political equality for all Latinos. Its goal is to promote and to protect the rights of Latino people and thereby, all peoples, to a decent standard of living, a high quality of education, decent housing and equal employment opportunities.

Labor Research Association, Inc., was formed in 1927. The purposes of the organization are to conduct investigations and studies of social and economic questions. It publishes its findings in the form of reports, articles, pamphlets and books. Labor Research Association joins as *amicus* in this brief because of its belief that the *Weber* case represents a significant challenge to affirmative action programs so necessary to achieve equality for all Americans.

Law Students Civil Rights Research Council (LSCRRC), is a law student organization which seeks to respond to the needs of minority and poor people in all areas of the United States. Since its inception in 1963, it has assisted the efforts of every major civil rights, civil liberties, and public interest law organization. In 1976, the LSCRRC Board of Directors mandated a sharper organizational focus on the problems surrounding affirmative action/minority admissions. The theme for its National Convention in October, 1978, was the "Crisis in Minority Admissions." It has also co-sponsored two regional minority admissions conferences during the 1976-77 year, and has sponsored several LSCRRC interns working on projects concerning affirmative action in the last two summers.

The *Legal Services Staff Association (LSSA)* is a labor organization that represents all non-managerial employees of Community Action for Legal Services in New York City. It understands the need for affirmative action because in their work its members daily witness the devastating effects on human beings of sexism and racism in our society. LSSA has a long held commitment to support affirmative action programs and policies. LSSA joins as an *amicus* because of its deep concern about the adverse repercussions that would result from a decision by this Court which does not fully support and encourage voluntary as well as court-ordered affirmative action programs.

Movimiento de Izquierda Nacional Puertorriqueño (M.I.N.P.-El Comite) is an organization composed predominantly of Puerto Ricans and other Latins dedicated to social change for the achievement of equality and full democratic rights. Affirmative action for minorities and women is one means, but a vital one, for overcoming the effects of centuries of discrimination and prejudice in this country. El Comite views the action brought by Weber as a serious threat to these efforts, having repercussions in the area of employment as well as housing, education, health care, and other vital areas of concern to the community that it serves.

The *National Ad Hoc Committee of Black Steelworkers (Ad Hoc)*, a national organization, has been deeply involved in fighting discrimination in both the steel industry and its own union, the United Steelworkers.

Ad Hoc has been an integral part of this struggle, leading to most of the key federal court decisions involving discrimination in the steel industry. Ad Hoc has filed hundreds of discrimination charges against steel companies which led to a consent decree in their industry. Ad Hoc commends all parties who are struggling in support of affirmative action. It joins as *amicus* in the hope that this brief will help the Court understand the necessity of speaking out in support of the affirmative action program under attack and lend its support in eradicating the badges and indicia of slavery.

Ad Hoc, an organization shaped, formed and grounded in the struggle of Black steelworkers, urges the Court not to stop the programs of social and economic reconstruction. They know from bitter experience that without the support of the courts, promises are made only to be a force for fundamental change in the system of all patterns in our free society which oppress or which give rise to the oppression of Blacks, minorities and women. Oppression refers not only to the economic, social and

political disenfranchisement. It is a disenfranchisement of the mind, the spiritual and moral values that hold together the fabric of a nation. By emancipating Blacks, women and other minorities from the effects of white racism, the Court thus provides authentic freedom for both white and Black people. The Court must not once again move through history ignoring the realities, and hiding these painful truths behind a facade of myths and real and imagined anxieties. Ad Hoc believes the task of the Court is to analyze the nature of this enormous problem in the light of the oppressed people in our free society.

The *National Alliance Against Racist and Political Repression* (*NAARPR*) is a broad based coalition of Church, civic, community, student and professional groups formed in 1973 to fight against repression, in its myriad forms. The NAARPR appears here because of its conviction that should the case of *Weber* v. *Kaiser Aluminum* be upheld, private programs across the U.S., designed to equalize the employment of Blacks, Native American, Asian American, Hispanic American and other minorities, will be virtually eliminated. Further, NAARPR believes that the immediate result of upholding *Weber* would be increased unemployment and further victimization of minority people. Current patterns and practices of police conduct will result in increased arrest of these unemployed citizens and further swell this nation's jails and prisons with numbers all out of proportion to minority representation in the population.

The *National Association of Social Workers* is a non-profit, national organization of professional social workers. It is devoted to the advancement of sound public policy for social work consumers as well as its 80,000 professional members. It joins as an amicus because it has voluntarily adopted an association-wide affirmative action program for women and minorities which would be threatened by any adverse holding in the *Weber* case.

The *National Bar Association* (*NBA*), 1900 L Street, N.W., Washington, D.C. 20036, is a professional membership organization representing more than 7,000 Black attorneys, judges and law students in the United States. The NBA was founded to achieve equalization of opportunities for minorities in the legal profession and to further the goal of equal justice for all.

Thus far, affirmative action has proven to be the most effective method for ameliorating the gross underrepresentation of minorities in the legal and other professions, and certainly has been the most critical factor in doubling the number of Black attorneys in America in the past decade. The NBA believes that this country cannot achieve true equality of opportunity without affirmative action to correct past societal discrimination. The NBA interprets affirmative action to mean those programatic efforts designed to fully integrate minorities and women in this country into employment, entrepreneurship and education. With the advent of the "reverse discrimination" principle, Blacks and other minorities stand to lose the gains that have been made through the use of affirmative action.

Legal actions, such as *Weber* and other cases, have dampened the efforts of employers and unions who are attempting to redress a national pattern of discrimination as mandated in Title VII and Executive Order 11246. Further approval of the reverse discrimination principle by the United States Supreme Court will not only impede, but will totally destroy the gains accomplished to date.

The *National Black Political Assembly* (*NBPA*) is a national, independent, Black political organization with chapters in 20 states. It is devoted to voter registration, political education campaigns, and the formulation of resolutions and positions on issues which affect the national Black community. It provides skill development training in various areas of electoral politics and community struggles, education, economics and other categories of knowledge and work as may be required to fulfill the goals of the

NBPA. The NBPA believes that affirmative action is essential to guarantee access to skilled jobs for those minorities who have traditionally been denied access to equal opportunity within American society, especially in the skilled crafts. The failure to maintain vigorous affirmative action programs in the skilled crafts would not only stymie progress in this area, but would offer an opportunity for those who are opposed to the entry of minorities into the skilled crafts on an equal basis to maintain and increase barriers which have been used traditionally to discriminate.

The *National Black United Fund* (*NBUF*) is a nonprofit, tax-exempt organization founded to increase the amount of charitable contributions targeted for organizations serving the black community. The local affiliates of NBUF raise funds through payroll deductions and will be adversely affected if there is any reduction in voluntary affirmative action plans which will produce a significant decline in black employment in predominantly white industry.

The *National Committee to Overturn the Bakke Decision* is a multi-racial organization, formed in April, 1977, to publicize the issues presented by racism and the *Bakke* decision. The NCOBD is comprised of community agencies, church groups, students, women's organizations and working people who organized to demand the reversal of the *Bakke* decision. Educational brochures, pamphlets, and leaflets were written to press the need for affirmative action and the need for people actively to take up the struggle against racism. In the aftermath of the *Bakke* decision, the NCOBD is continuing the struggle against racism and resolutely supports affirmative action plans in employment.

The *National Council of Churches of Christ* in the United States of America (*NCC*) is the cooperative agency of thirty national Protestant and Eastern Orthodox religious denominations with an aggregate membership of over forty million people. It is organized exclusively for

religious purposes and is committed to promoting the application of the law of Christ in every sphere of human relations.

The Council has been active in the civil rights effort since its inception in 1950 and has filed briefs *amicus curiae* with this Court in several historic cases, including *Jones* v. *Mayer* (1968) and *Regents* v. *Bakke* (1977). Because its Governing Board has repeatedly supported affirmative action to eliminate the disadvantage engendered by discrimination, the Council joins this brief to urge the Court to uphold voluntary programs of affirmative action in employment.

The *National Emergency Civil Liberties Committee* (*NECLC*) was founded in 1951 for the purpose of reestablishing the constitutional freedoms then under severe attack. For 27 years, NECLC has pursued this goal through numerous test cases to vindicate the civil liberties and civil rights of citizens, including many such cases before this Court. It has also engaged in extensive educational activities in support of the constitutional rights of citizens.

The *National Employment Law Project, Inc.* (*"The Project"*) is a legal services organization which provides backup assistance to local legal services offices in all areas of employment law. In conjunction with these local offices, and in some instances on its own, the Project represents a number of individual clients in employment discrimination litigation brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as well as constitutional and other statutory provisions.

Since its inception in 1969, the Project has been involved in efforts to combat the effects of racial discrimination in employment. It believes that progress in civil rights depends primarily upon the voluntary efforts of public and private organizations to rectify the widespread

effects of racial discrimination. Societal discrimination is so pervasive that litigation alone cannot be relied upon to protect the rights of racial and ethnic minorities. The Project has been involved in the creation of numerous affirmative action programs voluntarily and involuntarily adopted by private employers and public agencies that use racial classifications to remedy racial discrimination. Affirmance in this case would seriously jeopardize, if not destroy, these and future programs, to the severe detriment of the Project's minority clients.

The *National Organization of Legal Service Workers* (*NOLSW*) is a national organization open to all non-managerial employees of the Legal Services Corporation. NOLSW supports affirmative action within Legal Services offices, in employment generally, and in all other areas. NOLSW joins as an *amicus* because it believes that all affirmative action programs including voluntary ones are legal when designed to overcome the long history of discrimination against minorities and women in this country.

The *National Puerto Rican Law Students Association* (*National PRLSA*) is the organization established by Puerto Rican and other Latino Law students to represent the concerns and needs of their people before the national legal and educational communities. National PRLSA is specificaly committed to the increased recruitment and admission of Puerto Ricans and other Latinos into law schools, the strengthening of its local organizations at all law schools, and the development of positive working relationships with Latino lawyers, legal workers, community organizations and undergraduate groups across the nation. National PRLSA's specific concerns emanate from its solidarity with the struggles of all minority, poor and underrepresented people of the United States to attain and preserve full socio-economic and political equality.

The *New American Movement* is a nationwide democratic socialist organization which sees the struggle for

socialism integrally linked to the struggle for democracy and to the struggle for the special needs of women and minorities. It sees equality for women and minorities as essential to democracy and to the making of any progress in the lives of the American people as a whole. It joins as *amicus* in this *brief* because of its understanding of the importance of voluntary affirmative action as a step in gaining needed equality to provide better working and living conditions for all people.

The *New Jersey Association for Affirmative Action in Higher Education*, through its executive committee, confirms its interest in affirmative action by joining as an *amicus* in this brief (*Weber* v. *Kaiser Aluminum*) and encourages the United States Supreme Court to overturn both lower courts' decisions in order to allow voluntary affirmative action programs, including quotas without the necessity of an admission of past employment discrimination practices, a consent decree worked out through a government agency and/or a court finding of past employment discrimination.

The *New Jersey Association of Black Educators* (*NJABE*) has existed since 1973 and includes in its membership Black educators, students, and parents from throughout New Jersey. The NJABE is committed to developing and maintaining involvement in educational policymaking and implementation so that Blacks may enjoy greater educational and employment opportunities. The NJABE's interest in the *Weber* case is great because educational opportunity is rendered void without accompanying opportunities for employment in every facet of American society.

The *People's Alliance* is a national network of groups and individuals working to defend the achievements reached in struggles by working people and to build towards a society based on justice and full equality. Many of the people in this network are working women or mi-

nority people, some of whom got their current jobs because of affirmative action programs. In addition, all members and member organizations of the People's Alliance believe that an upholding of the claims of Brian Weber would serve the interests of the racist, sexist, right-wing forces which are working to roll back the gains of the civil rights, women's, and labor movements—gains which are just the first small steps in what should be a process of bringing justice and equality to all people in this land.

Philadelphia Area Project on Occupational Safety and Health (*PHILAPOSH*) is a non-profit corporation which unites labor, health, and legal workers to act for improvements in health, safety and environmental conditions for all workers in the Delaware Valley. It has traditionally supported affirmative action programs to overcome the effects of past discrimination against minority workers. Employment discrimination not only concentrates minority workers in the most hazardous and dangerous jobs, it is also a source of intense stress affecting all workers both on and off the job. Such stress is known to be a direct cause of illness and an indirect cause of occupational injuries. The elimination of employment discrimination, therefore, not only contributes to the achievement of a more democratic society, but also contributes toward the goal of improving the health and safety of workers on and off the job. For these reasons, PHILAPOSH has a special interest in joining with others to present an *amicus* brief to the Supreme Court in support of voluntary affirmative action employment plans.

The *Puerto Rican Socialist Party* (*PSP*) is a registered political party in Puerto Rico with active chapters in all major cities of the United States where there is a substantial Puerto Rican population. The United States Branch of the PSP seeks to organize Puerto Rican workers in the United States with the principal objective of obtaining the liberation of Puerto Rico and the establish-

ment of a socialist republic. Additionally, the PSP supports and participates in all those economic, social and political struggles in the United States which may contribute to the achievement of full democratic rights and the establishment of a Socialist form of government in the United States. In this context, the PSP views affirmative action as a modest victory of the working class, women, and racial and other minorities in their struggle toward total liberation. The PSP is vehemently opposed to any action such as the *Weber* case which might jeopardize these hard won rights.

Southerners for Economic Justice (*SEJ*) is an organization of prominent public citizens living throughout the South. It has offices in Knoxville, Tennessee, and Greenville, South Carolina.

SEJ was formed because of a conviction that economic rights can only be insured by extending the protection of our civil rights to the work place. In the South, SEJ has been active in community education, advocacy, and in monitoring race and sex discrimination on the job.

The *Southern Regional Council* is a non-partison, privately funded research and action organization founded in 1944. Composed of a 120 member bi-racial governing board drawn from eleven states, the council is working to eliminate institutional racism and poverty by making the region's own institutions more accountable to all the people they are supposed to serve. The Council accomplishes its work through a small core staff and special project staffs that analyze issues, monitor government responses to these issues, and document and publicize their findings in order to increase citizen awareness of and influence on public policy at the national, state, and local levels.

Teamsters for a Democratic Union (*TDU*) is a national rank and file group of Teamster Union members

and their spouses. TDU's purposes are to strengthen and democratize the ineffectual and corruption-ridden International Brotherhood of Teamsters. Consisting of some 3100 members nationwide, TDU has chapters or members in 45 Teamster locals. At its founding convention in 1976, TDU adopted resolutions strongly favoring affirmative action for both women and blacks in the trucking industry. As in the skilled trades, with union acquiescence, the trucking industry has long excluded women and minorities from the most favored jobs. TDU believes that past and present discrimination must be remedied at the employer's expense. It is employers in general who have been responsible for and have benefitted from discrimination. The affirmative action plan adopted by Kaiser in this case implements that position. At the 1978 national TDU convention, attended by 500 Teamsters, a resolution was unanimously passed on the floor mandating TDU to join in this proceeding as *amicus*, and to generally publicize the issues of this case.

The *Texas Farm Workers Union* (*TFU*) is an independent, unaffiliated union of farm workers in the Rio Grande Valley of south Texas, primarily composed of Mexican farm workers. It is currently attempting to secure the passage of legislation in the state of Texas which would allow farm workers to bargain collectively. The Union is vitally interested in the outcome of the *Weber* case because its members are the victims of discrimination as were the minority workers in the Gramercy, Louisiana area. Furthermore, most of the working population of the Rio Grande Valley are Mexicans. They, like the members of TFW, are discriminated against in all areas of their lives.

The *Transit Workers in Coalition, Inc., The Committee, the Revenue Collector's Benevolent Association*, the *Coalition of Concerned Transit Workers*, the *Coalition of Signal Maintainers* and *The Committee of Concerned*

Transit Workers are the major rank-and-file groups within *Local 100 of the Transport Workers Union of America, AFL-CIO*. Our local, which is multinational, has 33,000 members of whom 27,000 are employed by the New York City Transit Authority. We are united in our support of the affirmative action plan at stake here and the many similar plans which will be affected by this Court's ruling.

The Kaiser plan is but a small step toward remedying the discrimination to which minority workers have historically and currently been subjected. Our groups believe in justice for all workers and in the unity of all workers fighting for better conditions for all. Voluntary affirmative action plans are a concrete step toward equality between workers of different nationalities. It is this equality which lays the basis for the unity of workers of different nationalities. Thus affirmative action programs, far from discriminating against white workers, in the long run help white as well as minority workers.

The *United Church of Christ Commission for Racial Justice* has been actively involved in this struggle for civil and human rights since the 1960s. It has been actively involved in such cases as the Wilmington 10 and the Charlotte 3. It vigorously opposes this Court's decision in the *Bakke* case, a ruling which is producing devastating effects in the minority community. As the Commission has analyzed the present pending *Weber* v. *Kaiser Aluminum* case, it is convinced that this is simply another effort to set back the gains made in the civil rights area, with the focus now on employment.

The Commission joins in the filing of this *amicus* in the hope that this Court will have a sense of justice and foresight found lacking in the *Bakke* decision. We are firm in the belief that there are strong Thirteenth Amendment arguments in favor of the reversal and dismissal of this case.

The *United Coalition* is an organization of members of Local 51 of the United Auto Workers (UAW) committed to building more aggressive representation and equality for all in the union and work force. The struggle for equality is a prime interest of the United Coalition. The group has struggled in local level contract negotiations for strong affirmative action programs for entrance to the skilled trades for women, Blacks, and Arab workers. The Coalition has called for strict enforcement of existing affirmative action programs. It has advocated strict enforcement of transfer rights which gives priority to in-plant workers over new hirees resulting in improved jobs and advancement potential for women and minorities. United Coalition feels the *Weber* case poses a threat to all existing affirmative action programs.

The *United Construction Workers Association (UCWA)* is a rank and file workers' organization based in Seattle, Washington, representing Black and other minority workers in the building trades. The UCWA seeks out minority workers with potential employment discrimination problems, educates them about their rights under federal and state civil rights and labor laws, and, where necessary, initiates and sponsors law suits on behalf of its members to remedy discriminatory employment patterns. UCWA has always supported affirmative action in all forms as necessary to get rid of the badges and indicia of slavery.

Western Center on Law and Poverty is a public interest law firm representing low income clients throughout California. One of the highest priorities established for the Center by its client community during the past several years has been in the area of employment and affirmative action. In meeting that priority, the Center has litigated many cases which have resulted in the establishment of affirmative action programs for women and minorities, programs that will now be directly affected by the decision in *Weber*. The Center also filed

two briefs as *amicus curiae* in the *Bakke* case, reviewed and decided by the Supreme Court during its last term.

The *Women's Division of the Board of Global Ministries of the United Methodist Church (Women's Division)* is the national expression and policy making body of United Methodist Women. It is a mission organization formed more than 100 years ago to offer women opportunities for service from which they were excluded by the prevailing custom and official policy of the Church at that time. It has a long tradition of concern for the interests of women and children and especially of minority groups, and supports programs throughout the world. It has always supported the effort to extend full civil rights to all United States citizens. The Women's Division joins as an *amicus* because its program and policy supports and is consistent with the position taken in this brief.

Women for Racial and Economic Equality (WREE) is a multi-racial and multi-national organization with chapters in 25 cities. Its membership is mainly working class and low income women. It is concerned with those necessary actions and legislation that will enable women to achieve economic equality as the foundation for true social and political equality. The elimination of racism is basic to this effort since it is used to prevent unity among women who have the same needs, aspirations, and goals. Affirmative action is the operational base for any attempt to achieve economic parity for women and minorities. WREE believes that affirmative action must be expanded to include laws and regulations that enable women to get and *keep* jobs. This would mean day care, pregnancy and maternity benefits, health protection, etc. Minimum quota guidelines for hiring must be protected to make affirmative action meaningful.

The *Women's Law Project* is a non-profit, feminist, legal organization in Philadelphia, Pennsylvania. It is

working for the legal equality of men and women through litigation, public education, research and the representation of organized women's groups. Since its inception in 1974, the Project has been concerned with the implementation of constitutional principles of equality and of civil rights statutes. Its goal is to use these laws to effectuate a just transaction to a system in which the legal rights and obligations of both sexes are fully and equally recognized in all areas of life. Within these purposes, it has been particularly concerned about advancing opportunities for women in employment. The Project has been involved as counsel or *amicus* in a number of lawsuits aimed at opening up equal opportunities and benefits for women workers. Through this work, it has become aware of the critical role that voluntary affirmative action efforts in the workplace must play if women and minorities are to achieve their rightful place within the labor market.